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Supreme Court of the United States

OCTOBER TERM, 1966

No. 950

CHARLES W. SPENCER, ET AL.,
Petitioners,

versus

NEW ORLEANS TERMINAL COMPANY and SOUTHERN PACIFIC COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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NEW ORLEANS TERMINAL COMPANY and SOUTHERN PACIFIC COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The instant application for a writ of certiorari or review is filed herein by Thomas F. Donelon, Parish President of the Parish of Jefferson, State of Louisiana, Charles J. Eagan, Jr., Beauregard H. Miller, Jr., Harold L. Molaison, James J. Laforest, Jr., Jacob H. Sciambra, George J. Ackel, members of the Jefferson Parish Council, Alwynn Cronvich, Sheriff of the Parish of Jefferson, Louis G. DeSonier, Parish Attorney of the Parish of Jefferson, and Frank H. Langridge, District Attorney of the Parish of Jefferson. This application for a writ of certiorari or review stems from a decree of the United States Court of Appeals for the Fifth Circuit handed down on September 15, 1966. An application for rehearing was filed timely, and on October 11, 1966, the application for rehearing was denied.

(a) The opinion of the United States District Court for the Eastern District of Louisiana, in the instant case is found at 255 F. Supp. 1. The decree of the United States Court of Appeals for the Fifth Circuit is found at 366 F. 2d 160. Copies of each opinion are annexed hereto.

(b) The jurisdiction of this Honorable Court is invoked under Title 28, U. S. Code, Section 1254 (1), seeking to review the judgment of the United States Court of Appeals for the Fifth Circuit handed down on September 15, 1966. An application for rehearing was timely filed, and on October 11, 1966, the said application for rehearing was denied. The denial of the application for a rehearing was entered on October 11, 1966.

We respectfully submit that this Honorable Court has jurisdiction to review the decree in question herein by writ of certiorari pursuant to the provisions of 28 U. S. Code, Section 1254 (1).

(c) The issues in the case all revolve around one narrow point, i.e., whether a stretch of trackage in question measuring 11,816 feet in one instance and 1800 feet in another instance, constitutes a main line or an extension of a main line within the provisions of 46 U.S.C.A. Section 1 (18), or whether the said trackage constitutes a spur, industrial, switch or side track within the meaning of 46 U.S.C.A. Section 1 (22).

(d) The statutory provisions involved herein are as follows:

49 U. S. Code, Section 1 (18)

"No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation

under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching or side tracks."

49 U. S. Code, Section 1 (22)

"The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

(e) The instant action was for a permanent injunction and was filed in the United States District Court for the Eastern District of Louisiana by New Orleans Terminal Company against various officials of the Parish of Jefferson, State of Louisiana, on June 22, 1959. The action sought to invalidate certain ordinances passed by the Jefferson Parish Council relating to various railroad tracks in the Metairie area of the Parish of Jefferson. The juris-

diction of the trial court was invoked under the provisions of Sections 1331 and 1337 of Title 28, United States Code. The matter was decided by the trial court on October 28, 1965, dismissing plaintiff's request for the injunction and was subsequently appealed to the United States Court of Appeals for the Fifth Circuit, which latter Court rendered a judgment herein reversing the trial court on September 15, 1966. Thereafter an application for rehearing was filed, which application was denied on October 11, 1966.

The issues in the case all revolve around one narrow point, i.e., whether a stretch of trackage in question measuring 11,816 feet in one instance, and 1,800 feet in another instance constitutes a main line or an extension of a main line within the provisions of 49 U. S. Code, Section 1 (18), or whether the said trackage constitutes a spur, industrial, switch, or side track, within the meaning of 49 U. S. Code, Section 1 (22).

The instant action presents for review the problem of definition of railroad tracks which are designated as exempt tracks by Section 1 (22) of the Transportation Act of 1920, namely, spur, industrial, team, switching, or sidetracks, located or to be located wholly within one state. The definition of the exempt tracks as indicated by the Fifth Circuit Court of Appeals is sufficiently broad to literally write the exemption of Section 1 (22) out of the Transportation Act of 1920. The Fifth Circuit Court of Appeals limited the exempt tracks of Section 1 (22) to tracks "used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier on their delivery to the consignee." The limitation engrafted on Section 1 (22) by the Fifth Circuit Court of Appeals in the instant case is neither warranted nor justified by the wording of Section 1 (22) and has the effect of completely emasculating the exemption.

The instant case also presents for decision the question of the status of interchange tracks, i.e., whether interchange tracks are per se to be classified as either a main line or a spur, industrial, switch, team or side track.

A portion of the dilemma in the instant case is caused by the interpretation of the ruling of the Honorable Supreme Court of the United States in the case of *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. United States*, 214 F. Supp. 244 (E.D. Wis. 1963), which was reversed by the Honorable Supreme Court of the United States with a two line per curiam opinion stating:

> "The judgment is reversed. *Texas & P. R. Co. v. Gulf C. & S. F. R. Co.*, 270 U.S. 266, 278."

The U. S. District Court for the Eastern District of Louisiana in the instant case discussed this reversal in its decree and stated:

> "The proposition that not all interchange tracks come within the exclusive jurisdiction of the Commission finds support in that litigation on several grounds. First, in addition to the 262 foot long connecting interchange track, two parallel 'interchange sidings' were constructed to incidentally facilitate interchange movements. The Commission contended that 'the construction of a new piece of track to enable the carriers to initiate through route is a factor in determining whether the construction falls under Section 1 (18) or Section 1 (22).' If the **law** indicated conclusively that all interchange tracks were excluded from § 1 (22), it is reasonable to presume that the Commission would have so argued, but since it did not, tacit Commission approval of the proposition results. The Commission considered it a **fact** question.
>
> "Secondly, the Supreme Court's 'per curiam' reversal refers only to page 278 of volume 270, U. S.

Reports. The discussion there concerns an 'extension, of a railroad into territory already severed by another railroad which could have been 'inimical to the national interest.'

. ' "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.' 270 U.S. at p. 278.

"By emphasizing that the prime concern in determining Commission control over interchange tracks is an examination of effects on the national interest, be it by extension of lines or by new through routes which might tend to increase competition between railroads to the detriment of the general public, this language buttresses the proposition that not all interchange tracks come within the Commission's exclusive jurisdiction. Interchange tracks not affecting the 'national interest' need not be Commission controlled. The three-judge district court found, however, that a new route increasing competition was created. Thus, the basis for the Supreme Court's reversal does not even inferentially require a conclusion that all interchange tracks automatically fall outside the § 1 (22) exemptions. Noteworthy also is the fact that no reference was made in the 'per curiam' reversal to the language quoted at length above from the *Alabama & Vicksburg Ry. Co.* case, where the Supreme Court expressly referred to 'the interchange of car services.' "

The Fifth Circuit Court of Appeals commented upon the District Court's reliance upon that decision and stated that the judgment of the District Court was predicated upon an erroneous conception of the distinction between a

line of railroad or extension and a spur, industrial, team, switch or side track. A great deal of the dilemma was apparently caused or created by the two line per curiam opinion in the *Chicago, Milwaukee & St. Paul* case, *supra.* We respectfully submit that both the District Court for the Eastern District of Louisiana and the Fifth Circuit Court of Appeals have an obviously different opinion as to the meaning or significance of the two line per curiam reversal in the *Chicago, Milwaukee & St. Paul* case. We respectfully submit that the per curiam reversal should be clarified, and the law applied to the facts of the instant case so that this Honorable Court may clearly define whether:

(1) Interchange tracks are *per se* subject to regulation by either the Interstate Commerce Commission, or local regulatory authorities; or

(2) Whether the tests formerly applied by the jurisprudence to determine whether a track is a main line track, or an exempt tract defined by Section 1 (22) are going to in fact be used to determine the true nature of the track; or

(3) Whether the interpretation to be placed upon Section 1 (22) of the Transportation Act of 1920 is that the exempt tracks of Section 1 (22) can only be exempt where they are "used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee."

Your Honors will note that the quoted words in the last sentence immediately preceding are the words of the Fifth Circuit Court of Appeals in the instant case in defining exempt tracks within the purview of Section 1 (22). Your Honors will also note that the distinction created by the jurisprudence in the prior cases is as follows:

> "That the former (main line) are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from the shipper to the consignee, while the latter named tracks are for use in loading, reloading, storing and switching the cars and other things merely incidental to the regular train haul."

Your Honors will note that the Fifth Circuit Court of Appeals has inserted within the purview of the exempt tracks the words "incidental to the receipt of shipments" or "delivery to the consignee." In other words, the Fifth Circuit Court of Appeals would define an exempt track as being within the purview of Section 1 (22) only where that particular track is used for either delivery or receipt from shipper to carrier and vice versa. Your Honors will also note that Section 1 (22) of the Transportation Act contains no such jurisprudential addition. In other words, the limitation placed upon Section 1 (22) tracks by the Fifth Circuit Court of Appeals is clearly unauthorized and unwarranted. This interpretation likewise has the effect of making virtually every small track regardless of size, cost, use, etc., subject to the jurisdiction of the Interstate Commerce Commission. Your Honors will also note that the interpretation placed upon Section 1 (22) by the Fifth Circuit Court of Appeals has the effect of completely obliterating the legislative purpose of Section 1 (22), and so completely emasculating the intent that grave doubt is now cast on the decisions of this Honorable Court in *United States v. State of Idaho*, 298 U.S. 105, 56 S. Ct. 690, 80 L. Ed. 1070 (1936); *City of Yonkers v. United States*, 320 U.S. 685, 64 S. Ct. 327 (1944) and *Western & A. R. R. v. Georgia Public Service Commission*, 267 U.S. 493, 45 S. Ct. 409 (1925), each of which clearly indicate that Section 1 (22) "is a congressional policy of reserving exclusively

to the state's control over that group of essentially local activities."

We respectfully submit that the United States Court of Appeals for the Fifth Circuit has literally written Section 1 (22) out of the Transportation Act of 1920. That Court held:

> "The judgment of the district court was, we think, predicated upon an erroneous conception of the distinction between 'a line of railroad or extension thereof' and 'spur, industrial, team, switching or side tracks.' If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof,' and there can be no abandonment of such trackage without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission. If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction.
>
> "The district Court tested the jurisdiction by the effect which the removal of Tracks B and C would have upon the safety, adequacy, cost efficiency, development, coordination and preservation of our National transportation system in general and the trackage here involved in particular. The district court concluded that the abandonment of Tracks B and C would not economically jeopardize service to the public. It determined that Tracks B and C do not form part of an independent through route, invade the territory of other carriers or affect competition. Using these tests as a guide, the district court decided that Tracks B and C were switching or side tracks and that the challenged ordinances were valid.

"As already noted, the New Orleans Terminal Company is a part of the Southern Railway System. It is not, as its name might indicate, merely a terminal facility. It is engaged in the handling of freight movements, both interstate and intrastate, from, to and through the metropolitan area of New Orleans. Tracks B and C, in no small part, are utilized in the handling of these traffic movements. They are not spur, industrial, team, switching or side tracks. They are a part of the line of railroad of the New Orleans Terminal Company. As such, they cannot be abandoned, nor can their abandonment be required by Jefferson Parish unless a certificate of abandonment be issued by the Interstate Commerce Commission.

"The use of the tracks as passing tracks, for the temporary storage of cars and for occasional switching operations does not make them any the less 'lines of railroad' since they are used substantially in the through movement of freight."

The Fifth Circuit has thus held that a track is a main line or an extension of a main line although prolonged parking or storing of cars thereon has existed, in some instances for more than four hours. We respectfully submit that such a track is clearly an exempt switch or sidetrack within the exemption of Section 1 (22).

In the original brief filed herein by counsel for defendants-applicants, we discuss at length all of the decisions which have heretofore defined the exempt type of tracks designated in Section 1 (22), i.e., side tracks, switch tracks, spur tracks, etc. We respectfully submit that we have shown in our original brief that no decision deals with the nature of interchange tracks per se. It will also be noted that the scheme of the Transportation Act of 1920 does not mention interchange tracks per se as being subject to Interstate Commerce Commission jurisdiction

or being exempt therefrom. In other words, we respectfully submit that it is clear that the purpose of the Congress in enacting the Transportation Act of 1920 was to determine the status of interchange tracks solely from the nature of the tracks, i.e., whether the said tracks were either a main line track, or an extension of a main line, as distinguished from a spur, industrial, switch, or side track. In other words, the absence of interchange tracks from either Section 1 (18) or Section 1 (22) is clearly an indication that the Congress had not sought to classify interchange tracks any differently from any other tracks. If an interchange track is long enough, costly enough and a part of the long haul, then it is to be considered a main line track and this is how the said tracks should be classified. On the other hand, if the track is short enough, inexpensive enough, not a part of the long haul, although it may be used for purposes incidental thereto such as for parking or storing or other uses incidental to the main line haul, then the tracks are of the exempt type. We respectfully submit that the tracks in the instant case, Track B and Track C are of the exempt type.

Petitioner shows that this Honorable Court may review the decree of the Honorable Fifth Circuit Court of Appeals by writ of certiorari, all as provided for by 28 U. S. Code, Section 1254.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari directed to the Honorable Judges of the Fifth Circuit Court of Appeals, commanding them to send to this Court the necessary certified copies of the proceedings entitled "New Orleans Terminal Company vs. Charles W. Spencer, et al", No. 23241 on the Docket of said Court and lately pending therein, to the end that their validity may be ascertained, and that after due proceedings, a writ of certiorari or review issue herein, to

the end that the validity of said proceedings may be ascertained.

Petitioner further prays for all necessary writs and orders and decrees in the premises, and for all general and equitable relief.

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ATTORNEYS FOR APPLICANTS.

CERTIFICATE

The undersigned does hereby certify that copies of the above and foregoing application for a writ of certiorari or review has been mailed to the following attorneys of record for the plaintiff: Benjamin Slater, Jr., Monroe & Lemann, Whitney Building, New Orleans, Louisiana; W. Graham Claytor, Jr., Arnold B. McKinnon, Washington, D. C.; Covington & Burling, and William H. Allen, Washington, D. C., by depositing the same in the U. S. Mail, postage prepaid.